IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

BOOKER T. HUDSON, JR., :

Petitioner, :

v. : No. 04-1360

MICHIGAN. :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Monday, January 9, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

DAVID A. MORAN, ESQ., Detroit, Michigan; on behalf of the Petitioner.

TIMOTHY A. BAUGHMAN, ESQ., Detroit, Michigan; on behalf of the Respondent.

DAVID B. SALMONS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument in Hudson versus Michigan.

Mr. Moran.

ORAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF PETITIONER

MR. MORAN: Mr. Chief Justice, and may it please the Court:

Over the last 50 years, courts in virtually every American jurisdiction have suppressed evidence seized inside homes following knock-and-announce violations -- including this Court, on two occasions. Those suppression orders reflect an understanding of two points key to this appeal. The first point is that the manner of entry -- and, in particular, a knock-and-announce violation -- is not somehow independent of the police activity that occurs inside the house. And, as this Court directly recognized in Wilson, the reasonableness of police activity inside a home is dependent on the manner of the police entry.

JUSTICE O'CONNOR: May I ask you whether there are statutes in various States that allow an officer to get a no-knock warrant?

MR. MORAN: Yes, there are, Justice O'Connor.

JUSTICE O'CONNOR: And does Michigan have such a statute?

MR. MORAN: I do not believe so, Justice O'Connor.

JUSTICE O'CONNOR: How common are those statutes?

MR. MORAN: I believe about half the States have such no-knock -- no-knock statutes. So, in Michigan, a police officer -- if the -- if the circumstances on the scene justify a no-knock entry, then the officer is permitted, by case law and, of course, by the precedents of this Court, to go ahead and do so.

JUSTICE O'CONNOR: Why would an officer, without such permission, want to make a no-knock entry while possessing a warrant --

MR. MORAN: Well --

JUSTICE O'CONNOR: -- a search warrant?

MR. MORAN: -- as this case illustrates, sometimes officers believe that it is to their advantage to perform a no-knock entry, or to fail to comply with the knock-and-announce requirement. And that is why --

JUSTICE O'CONNOR: Why?

MR. MORAN: Well, Officer Good apparently thought that his safety would be better served he if disregarded the knock-and-announce requirement; and so, he candidly testified, at the evidentiary hearing, that it's essentially his policy, in drug cases, to go in without a -- without performing the necessary knock-and-announce. And that was 1 year after the -- this Court's decision in Richards, saying that there is no per-se exclusion of drug cases from the knock-and-announce requirement.

But that brings me to the second reason why courts have almost universally, until the Stevens case in 1999, held that suppression of evidence is necessary, and that is deterrence; because, without the suppression of evidence, there is very little chance that the officers will be deterred from routinely violating the knock-and-announce requirement, from adopting a sort of personal violation of the requirement, just as --

JUSTICE SCALIA: I don't know, I'd be worried -- you know, bust in somebody's door -- that the homeowner wouldn't shoot me. Without announcing that I'm the police, he had every reason to believe he's under attack. Isn't that a considerable

deterrent?

MR. MORAN: Yes, that's the one purpose of the knock-and-announce requirement that doesn't protect the homeowner's interest, that protects the officer's interest --

JUSTICE SCALIA: Exactly.

MR. MORAN: -- against being shot.

JUSTICE SCALIA: Right.

MR. MORAN: However, what we'll see then, if there is no exclusion of evidence following knock-and-announce rules, are entries precisely like the one we have here, where the officers will, in fact, announce -- they yell, "Police, search warrant" -- but then they'll immediately go in. Officer Good said that he went in real fast. He went in, and it took him just a few seconds to get in the door. So, that's what they'll do. They'll announce -- some officers will announce, because they'll want the --

JUSTICE SCALIA: Yes.

MR. MORAN: -- people inside to know that they're police, but they will not wait for a refusal, and they certainly will not wait for a reasonable amount of time for some --

JUSTICE SCALIA: I'm not sure I agree with a point that you make in your brief that civil

actions simply are of no use. That might have been the case when we first adopted the exclusionary rule, but our docket is crowded with 1983 cases brought by prisoners, brought by convicted felons, and many of these cases are successful below. What reason is there to believe that that wouldn't be an adequate deterrent?

MR. MORAN: Simply, Justice Scalia, that, as far as we can determine, no one wins a knock-and-announce case, or we haven't been able to find a single case in which someone has actually recovered damages for a knock-and-announce violation. So, if this --

JUSTICE GINSBURG: Is that because the damages are slight or because there's a defense that is successful? What has been the defense in these tort cases?

MR. MORAN: Both, Justice Ginsburg. First of all, in many cases, such as this one, where the police don't actually destroy the door, it would be very hard to quantify the damages, and it would be very hard to find a lawyer to take a case such as this. But the second barrier is the various immunities, tort immunities. In Section 1983 actions, there are qualified immunities that make it

difficult to win a suit. And because it is not a bright line as to when the police officers have to knock and announce, and when they do not -- that is, Is there a reasonable suspicion that a quick entry or a no-knock entry will be met with violence or that the evidence will be destroyed? -- courts tend to be very generous in granting qualified immunity to officers -- that is, concluding that some reasonable officers might have concluded that it was justified to dispense with the knock-and-announcement requirement.

JUSTICE SCALIA: Of course, that same problem exists if the consequence is exclusion of evidence. Courts are going to view it the same way. You're not going to avoid that problem by excluding evidence.

MR. MORAN: Well, there -- but there is not a qualified-immunity defense to the exclusionary rule.

JUSTICE SCALIA: Well --

MR. MORAN: And so, if the Court concluded --

JUSTICE SCALIA: Well, I mean, your point is, it's very hard to tell whether they waited long enough, right? And that's why they don't win a lot

of these cases. But the same thing is going to be true if the consequence of not waiting long enough is the exclusion of the evidence. The court is going to be very -- it's going to be very difficult to tell if they waited long enough, and, as you say, the court is likely to say, you know, "Let it go."

MR. MORAN: That's true, to some extent, Justice Scalia, but, as an empirical matter, I've cited many cases, in my brief, over the last 50 years where courts from a vast majority of American jurisdictions have found knock-and-announce violations in criminal cases, and have, therefore, excluded the evidence, including this Court, on two occasions, 1958 and 1968. So, courts do find knock-and-announce violations in criminal cases.

JUSTICE SCALIA: Our two cases did not -- did not raise that issue. The issue was not decided in those cases, was it?

MR. MORAN: The issue of a knock-and-announce --

JUSTICE SCALIA: Right.

MR. MORAN: -- violation leading to exclusion of evidence --

JUSTICE SCALIA: Right.

MR. MORAN: -- was decided. The -- there

was not an inevitable-discovery issue raised in those two cases, because those cases predated the inevitable-discovery doctrine. But, of course, in 1958 and 1968, this Court was very familiar with the independent-source doctrine. And, really, the argument that the Michigan Supreme Court has adopted -- they call it an inevitable-discovery argument; it's really an independent-source doctrine.

CHIEF JUSTICE ROBERTS: You don't -- you don't dispute the application of the inevitable-discovery principle here, do you?

MR. MORAN: Not at all, Justice -- Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Okay.

MR. MORAN: No, the --

CHIEF JUSTICE ROBERTS: And you don't dispute that the purpose of the knock-and-announce rule is not to allow the targets of the search to dispose of evidence, or anything of that sort.

MR. MORAN: Absolutely not. The purpose of the knock-and-announce rule is to protect the homeowner's privacy rights. It's one of the core parts of the right of the people to be secure in their homes against unreasonable police invasions.

CHIEF JUSTICE ROBERTS: Well, but it's a

limited privacy right, of course. These people have a warrant, right?

MR. MORAN: That's correct.

CHIEF JUSTICE ROBERTS: So, how would you describe the privacy interest that the knock-and-announce rule is protecting?

MR. MORAN: Well, I think this Court has described it well in the -- in its most recent cases -- in Banks and Richards, in particular, as well as Ramirez and Wilson -- that it is a right against being terrified by having the police come in. It is a right against being embarrassed. People might be in all stages of undress or in compromising positions when the police come in. And it is a right against having one's door destroyed. The English cases, the early English cases, first recognized that it's a right against having one's --

CHIEF JUSTICE ROBERTS: So, it doesn't go at all to the items that are the target of the warrant.

MR. MORAN: No.

CHIEF JUSTICE ROBERTS: And so, why should the remedy for the violation be to exclude those items? The privacy that's protected isn't the cocaine, the weapons, the other items that were

discovered.

MR. MORAN: Well, with respect, Mr. Chief Justice, I think you could say the same thing about the warrant requirement. The purpose of the warrant requirement is also to protect the sanctity and the privacy of the home; it's not protect contraband that one might have in the home, or whatever it is that the police are looking for. It's --

CHIEF JUSTICE ROBERTS: No, it's to protect privacy in the possessions and papers and effects. And these are possessions, papers, and effects. It goes right to what the police are trying to seize, and you have an independent magistrate make a determination that there's probable cause to believe it, et cetera, et cetera. The knock-and-announce rule is an entirely -- concerned with entirely different things. And yet, you're enforcing it by excluding the papers, effects, and possessions.

MR. MORAN: And I think the courts have recognized that it's necessary to enforce it that way, because other methods of enforcing it will not work. But --

JUSTICE KENNEDY: Well, but just --

MR. MORAN: -- I think it's --

JUSTICE KENNEDY: -- just on the point of

the causal relation that the Chief Justice was exploring, I mean, there is a causal relation in a but-for sense. We know that.

MR. MORAN: Yes.

JUSTICE KENNEDY: I suppose the position of the Respondent is that the minute there's an entry after the knock violation -- the no-knock violation -- the minute there's an entry, that injury ceases, so that it's different from a warrantless rummaging-around through drawers and so forth. I suppose that would be their argument.

MR. MORAN: I think that is their argument, Justice Kennedy, and I respectfully disagree with it. As a historical matter, even the early English cases recognized that when an officer illegally entered -- a sheriff illegally entered a home with a valid writ, that officer became a trespasser, and the activity that he performed in the home was, therefore, illegal. In the reply brief, I cited several early American cases, from the 1830s and 1840s, holding that when an officer had a valid writ to seize a debtor's goods, but illegally entered the home, then that writ became no good; and, therefore, the officer -- the sheriff, in those cases -- could be sued, not only for the illegal entry, but also for the seizure

of the goods that he had a valid warrant, or a valid writ, to seize, and that that --

JUSTICE SCALIA: Yes, but here it was a warrant to enter the home, not to seize particular goods. So, the entry of the home was not illegal. The entering of the home was perfectly okay. What was illegal was not knocking and announcing in advance. It seems to me that's quite a different -- quite a different issue, and the causality is quite different.

MR. MORAN: Well, Justice Scalia, I respectfully disagree that the entry was not illegal. I believe the entry was illegal, because what a warrant authorizes an -- a -- an officer to do is to make a legal entry. It does not allow the officer to enter however he pleases; it allows the officer to make an entry that complies with the law -- in particular, the fourth amendment. And so, the entry was illegal. They could have performed a legal entry.

JUSTICE SCALIA: I understand that, but the essence of the violation was not the entering; whereas, in the cases, the old common-law cases you're talking about, the essence of the violation was the entering. Here, the entering was perfectly

okay; it was the manner of it, the failure to give the advance notice, that made it bad. And that, it seems to me, creates a different situation.

MR. MORAN: I think, starting in Semayne's case, the Court recognized that even if the officer would have a right to knock down the door after a refusal of entry was obtained, that if the officer did not wait for that refusal, then the entry was illegal. And so, I think the common-law cases do support -- the old English common-law cases, starting with Semayne's case -- do support the notion that the entry -- the entry does become illegal if the officer does not wait for the refusal. And in this case, of course, the officer did not wait at all for any refusal, candidly admitted that he went in as soon as he could get through the door, as quickly as he could.

JUSTICE GINSBURG: Mr. Moran, would you clarify an answer you gave to Justice O'Connor at the outset of the argument? You said there is no statutory right to get a no-knock warrant. But did you say, as a matter of case law and practice, that can be done in Michigan?

MR. MORAN: I don't believe so. I don't believe that Michigan still allows for no-knock

warrants. But officers, of course, can perform no-knock entries when arriving at the scene, the circumstances justify a no-knock entry.

CHIEF JUSTICE ROBERTS: You mean, if you had a case where the reason you were arresting the guy is because he's shot through the door the last three times somebody knocked and announced, you still have to knock and announce, under Michigan law?

MR. MORAN: No, I don't think so, Mr. Chief Justice. I think, in that case, that would satisfy the Richards standard. In that case, the officer would have particularized suspicions amounting --

CHIEF JUSTICE ROBERTS: But he couldn't get a warrant saying that.

MR. MORAN: I don't believe Michigan has a procedure for granting no-knock warrants, not --

JUSTICE BREYER: But that's -- that's actually what's disturbing me about this, because I thought the knock-and-announce rule was a rule that would allow a policeman to go in without knocking and announcing when he has reasonable grounds for thinking he might get shot if he didn't. So, I -- as I read the briefs, I thought maybe that's not how it's being implemented, that the policemen are supposed to run the risk of being shot. I didn't

think that was the situation. So, I'd appreciate your explaining that to me.

MR. MORAN: Well, in Richards, this Court said that if there are particular facts about this particular entry that would make an officer have reasonable suspicions that he is going to be shot at or the evidence is going to be destroyed, then the officer may dispense with the knock-and-announce requirement. There were no such suspicions in this case, and that's why the prosecution conceded, at the outset and at every step since, that it was a knock-and-announce violation. The officers had no information about this particular --

JUSTICE BREYER: Would it be sufficient if the officer says, "One, this is a drug gang; two, they don't let people into the house whom they don't know; and, three, they have guns"?

MR. MORAN: That might be sufficient, after Richards, but that's not the facts of this case. We have none of those facts in this case. They were serving a warrant, and they had no information that they were going to be in particular danger. They had no information, for example, that there were drugs, stored near the toilet, that were going to be flushed down.

JUSTICE STEVENS: Let me just be sure I understand the hypothetical case, where, three times before, there had been warrants served, and, each time, the homeowner shot at the officer, the fourth time, they could go in without waiting.

MR. MORAN: I think that would be an easy case, Justice Stevens.

JUSTICE STEVENS: You think it would, okay.

MR. MORAN: Because then you would have particular facts about this particular residence and the people involved. I think that would be a very easy case for a no-knock entry. We --

CHIEF JUSTICE ROBERTS: But you can't get a warrant that says he can do that.

MR. MORAN: I don't believe Michigan has that procedure. Perhaps Mr. Baughman can correct me. He's a -- he's with the prosecuting attorney's office. But I don't believe Michigan has that procedure. Not all States do have that procedure. And, instead, States that don't have that procedure simply leave it to the officer to determine if there are those facts that justify a no-knock entry. So, there are many entries in Michigan, that occur all the time, that do not comply with the knock-and-announce requirement. And that's fine, because the

officer does, in fact, have the particularized facts justifying a no-knock entry.

JUSTICE KENNEDY: We've been down this route before in other cases, like Wilson, but it's still a troublesome measure. It's hard for me to believe that if a person has drugs in the pockets of his trousers or on the -- next to the chair where he's sitting, that he wouldn't immediately run and try to dispose them. I just think that it's ordinary behavior. And, if that's so, then it would follow that you never have to knock if you're looking for drugs that might be on the person. Do you have any comment as to that?

MR. MORAN: Well, then that would -- this Court, I think, would have to reverse Richards, because Richards said that the fact that it's a felony drug investigation does not justify a blanket exclusion from the knock-and-announce requirement. And this Court unanimously held, in Richards, that the knock-and-announce requirement applies in felony drug cases --

JUSTICE KENNEDY: But --

MR. MORAN: -- unless --

JUSTICE KENNEDY: But if we say that a likelihood -- or that the -- or substantial

probability that the evidence will be destroyed allows the no-knock, why won't that be true in every drug case, other than for what we said in Richards?

MR. MORAN: Well, because in Richards --

JUSTICE KENNEDY: I mean, do people say, "Oh, they've got me now. I won't get rid of the drugs"?

MR. MORAN: Well, first of all, Justice Kennedy, I think the law presumes that homeowners will either make an explicit refusal, "No," or will answer the door; and primarily that they'll do the latter. The presumption of the homeowner that we're talking about is an innocent homeowner, somebody who is either -- has nothing to do with whatever the police are looking for. There are many cases where the police are looking for goods that are not connected to the people who are home.

JUSTICE KENNEDY: Well, when there's probable cause to enter, there's no presumption of innocence, is there, or am I wrong?

MR. MORAN: Well, it -- with -- probable cause is a standard at somewhere around 50 percent, and a very large number of warrants are executed on the homes of people who have nothing, or people who -- there is something that the police are looking for,

but they don't have anything to do with it; they're third-party homeowners. And, for that reason, the knock-and-announce requirement recognizes that many, many warrants -- many, many searches -- will be executed on the homes of perfectly upstanding, innocent people. And --

CHIEF JUSTICE ROBERTS: Do you have -- do you have any empirical basis for your statement that many warrants are executed and they don't find anything?

MR. MORAN: Well, I don't have any statistics. I'm sure the FBI keeps statistics on at least Federal warrants. But it's true that in a large number of warrants, the police don't find what they're looking for, because probable cause is a standard that is not particularly high.

CHIEF JUSTICE ROBERTS: Do you have any basis for your statement that, in a large number, they don't find what they're -- anything that they're looking for?

MR. MORAN: I don't have any empirical evidence, but certainly lots and lots of anecdotal evidence, from reading newspaper accounts of police --

JUSTICE STEVENS: And you --

MR. MORAN: -- searches.

JUSTICE STEVENS: -- you don't dispute the fact that presumption of innocence -- the presumption of innocence survives an indictment, doesn't it?

MR. MORAN: It does, and I think it --

JUSTICE STEVENS: Yes.

MR. MORAN: -- survives the search warrant.

JUSTICE STEVENS: So probable cause is not enough to eliminate the presumption of innocence.

MR. MORAN: I certainly would argue that --

JUSTICE STEVENS: Yes.

MR. MORAN: -- Justice Stevens, that probable cause it not a very high standard. And in -- many search warrants are, in fact, served on the homes of people who are not suspected, because they're thought to be the place where stuff was stored, but not be the people who are suspected of doing anything wrong in the first place.

JUSTICE GINSBURG: In --

JUSTICE SCALIA: Mr. Moran, these old common-law cases you referred to, which held that a failure to knock and announce renders the entry unlawful, what was the consequence, in those cases?

MR. MORAN: Those were cases in which, typically, the sheriff was sued for trespassing.

JUSTICE SCALIA: Right. And the evidence would -- if found, was not excluded, right?

MR. MORAN: No. There was --

JUSTICE SCALIA: So, if we wanted to be faithful to those common-law cases, we wouldn't exclude the evidence.

MR. MORAN: I think things have changed, Justice Scalia, since those common-law days, for that reason.

JUSTICE SCALIA: Well, then you shouldn't have cited the common-law case.

[Laughter.]

MR. MORAN: Well, Justice Stevens -- I mean, excuse me, Justice Scalia, things have changed, in the sense, first of all, that in those days there was a common-law writ of trespass. If one were to file, in Michigan, a complaint for trespass against the sheriff, one would be laughed out of court today, because all that you have is a tort suit, which you have to show an extreme violation -- I cited the Michigan statute that requires extreme recklessness on the part of the police officer.

The second point is that in those days the sheriffs were -- there were adequate means to control the behavior of sheriffs, because they were seen as

arms of the judiciary. That, of course, was before the rise of the independent police forces that we have today. And so, the exclusionary rule, of course, was adopted in the late 1800s, early 1900s -- in part, in response to the changing circumstances of the police. The police were no longer under the direct control of the judiciary; and so, different remedies were necessary in order to assure compliance with constitutional rights.

JUSTICE GINSBURG: In the courts that have allowed this action to go forward, has the rationale been that there is no other effective deterrent to ignoring or violating the knock-and-announce rule?

MR. MORAN: Yes, Justice Ginsburg. At last count now, 11 State and Federal appellate courts have directly rejected the Michigan Supreme Court's reasoning. The Idaho Court of Appeals just joined the list 2 weeks ago, in a -- in a case that I -- is not cited, because it's so recent. And they have uniformly -- I believe all 11 of those cases have said that, "Were we to hold otherwise, the knock-and-announce rule would become meaningless," a worry that this Court expressed in Richards. This Court was very concerned, in Richards, that simply excluding drug cases from the knock-and-announce rule would

make the knock-and-announce rule meaningless. And these courts have noted that statement -- the courts that came out -- this -- the decisions that came out after Richards, and have said, "If that is meaningless, then it would be especially meaningless if we were to exclude the entire knock-and-announce rule from the exclusionary rule, that there would be virtually no reason for police officers ever to comply with a knock-and-announce requirement.

And so, I think the deterrence rationale is a large part of this, and that's what distinguishes this case from the inevitable-discovery cases, which the Michigan Supreme Court relied on.

JUSTICE SCALIA: Well, I suppose there are a lot of other violations of constitutional rights by the police that are very hard to get at, and that cannot be remedied. And I suppose we could punish them by excluding all the evidence, as well. We don't do so, simply because there's no causality. We insist upon a causal connection between the two. It's not enough just to say the -- this is the only way to stop the police from making the violation.

MR. MORAN: No, it is not enough, but what is critical in this case is that the knock-and-announce violation goes to the manner of entry, and

the Court has long recognized that the two predicates for seizure of goods inside a home, or arrest inside a home, are authority to enter the home, which is not contested here, and a lawful entry. And if either one of those two predicates is missing, then you have grounds to suppress the evidence; that is, the evidence inside the home is in the fruit of the unlawful entry.

JUSTICE SCALIA: What about our opinion in Ramirez, where the manner of entry was such that there was damage to property?

MR. MORAN: I --

JUSTICE SCALIA: We didn't exclude the evidence there, did we?

MR. MORAN: No. First of all, this Court didn't find that there was a violation in the -- in the damage in property; this Court found no -- did not find, as a matter of law, any fourth-amendment violation. But I read the Ramirez -- that language from Ramirez as saying that as long as the entry remains lawful -- and, in Ramirez, the entry was lawful, because there were valid grounds to dispense with the knock-and-announce requirement. You had a known dangerous fugitive, who had bragged that he wouldn't be taken alive. And so, there was every

reason for the officers to dispense with the knock-and-announce requirement. Therefore, the entry was legal. They had both authority -- that is, the warrant -- and they had a valid entry -- that is, a no-knock entry that was justified by reasonable suspicion that the officers would be met with violence if they did knock and announce their presence. And so, we -- in Ramirez, we have a lawful entry. The language that's quoted from Ramirez directly says, "the entry remains lawful," or words to that effect. And you have a different case if you had --

JUSTICE SCALIA: Well, what had happened? Had they broken a window on the way in? Is that --

MR. MORAN: That's correct.

JUSTICE SCALIA: Well, the entry remains lawful, despite the fact that the manner of the entry, which included the breaking of a window, was unlawful. I think what the Court meant was not, as you're portraying it, that, objectively, the entry was lawful. I think they were speaking: as a matter of law, despite the fact that the breaking of the window was wrong, the entry was lawful. Just as your opponent is saying here: despite the fact that there was no knock-and-announce, the entry was lawful.

MR. MORAN: Justice Scalia, I don't see any language in Ramirez saying that the breaking of the window was unlawful. I think the breaking of the window -- I read the Ramirez opinion as saying the breaking --

JUSTICE STEVENS: But even if it was unlawful, it was not unconstitutional.

MR. MORAN: It wasn't -- certainly wasn't unconstitutional. Often, when the police perform a valid no-knock entry, they will damage property. Typically, they will destroy the door. And so, the breaking of the window in Ramirez, I don't believe was unlawful. I believe it was perfectly valid way for the officer to perform the entry; that is, to put the gun through the window in the garage area in order to prevent -- they believed that the homeowner had guns there and was going to use the -- run to the guns in order to repel the entry. And so, I believe it was a perfectly lawful entry.

I think what Ramirez was saying was that not all fourth-amendment violations bear fruit. And I agree with that. We do not have -- we do not propound here a theory of everything, having to do with all fourth-amendment violations and the fruit that they propound. We simply say that, with a

knock-and-announce violation that makes the entry unlawful, the evidence found inside the home, and only inside the home, is the fruit of that violation, unless there truly is an inevitable-discovery or independent-source argument; that is, something independent of the entry, which can't be done here, when the police simply barge in and, in matter of seconds, perhaps minutes, find the evidence. So, the --

JUSTICE O'CONNOR: Mr. Moran, is it undisputed by you that the client would not have disposed of the drugs if the police had waited a few seconds?

MR. MORAN: Yes, we presume that he would have come to the door. He was just a few feet from the door, in fact. He was right in front of the door. We presume that he would have come to the door, answered the door, admitted the police, and the police would -- then would have performed the search.

If the Court has no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Moran.

MR. MORAN: Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Mr. Baughman.

ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN

ON BEHALF OF RESPONDENT

MR. BAUGHMAN: Mr. Chief Justice, and may it please the Court:

The metaphor of "fruit of the poisonous tree" is frequently employed when the exclusionary rule is discussed. And that metaphor is apt. It is apt, because the sanction of exclusion, which is not, itself, constitutionally required, is designed to deter, and to deter in a specific way: to deter by depriving the police of the result -- the fruit, the product, the evidentiary advantage that has been gained by their improper conduct. And so --

JUSTICE O'CONNOR: Would you agree there is a knock-and-announce requirement --

MR. BAUGHMAN: Yes.

JUSTICE O'CONNOR: -- even though there is a warrant?

MR. BAUGHMAN: Yes.

JUSTICE O'CONNOR: And do you agree that that was violated here, that there wasn't really a knock-and-announce here?

MR. BAUGHMAN: Yes, there was a -- an announcement, but a failure to wait. There's not -- the announcement principles require --

JUSTICE O'CONNOR: All right.

MR. BAUGHMAN: -- not only an --

JUSTICE O'CONNOR: Now, is exclusion of evidence in these circumstances a deterrent, so that the police would be less likely to do that?

MR. BAUGHMAN: It may be.

JUSTICE O'CONNOR: Yes.

MR. BAUGHMAN: But I believe that, before the question of deterrence is reached, the question of causality must be addressed. This Court has always said that causation is a necessary, though not always sufficient, predicate, for a application of the exclusionary rule. The way this Court has put it is that it is clear that implementation of the exclusionary rule in particular cases begins with the premise that the challenged evidence is, in some sense, the product of the improper police activity. So, I believe --

JUSTICE SOUTER: Well, isn't it --

MR. BAUGHMAN: -- the question --

JUSTICE SOUTER: -- the product, here? I mean, if they had not -- if they had not entered, they would not have gotten their evidence. Their entry, because it violated knock-and-announce, was unlawful. So, it is a product, isn't it?

MR. BAUGHMAN: I think -- I think where I would disagree, Your Honor, is that the entry is lawful -- in fact, it's not simply authorized, it's commanded by judicial order. The use of force --

JUSTICE SOUTER: Well, an entry that conformed with knock-and-announce would have been lawful. This entry didn't. This entry was unreasonable. So, I don't see how your argument fits the facts.

MR. BAUGHMAN: The way I distinguish it, and what I -- where I believe the distinction lies is that what was improper was not the fact of entry; what was improper was the use of force in entry. The --

JUSTICE SOUTER: Well, but --

MR. BAUGHMAN: -- knock-and-announce --

JUSTICE SOUTER: -- I mean, how do you make that distinction? I mean, it's like the -- you know, the Cheshire cat and a -- and the smile; you can't distinguish the two. There was one entry, and that entry violated the knock-and-announce rule.

MR. BAUGHMAN: Well, again, the use of force in making the entry violated the knock-and-announce rule. The entry itself was commanded by the order of the court.

JUSTICE BREYER: Well, how is that different from saying the entry is lawful, its only problem is, it was done without a warrant? I mean, you know, he's --

MR. BAUGHMAN: Because if they're --

JUSTICE BREYER: -- inside the building; just, unfortunately, the means wasn't right. No warrant.

MR. BAUGHMAN: No, if --

JUSTICE BREYER: The means wasn't right. No knock-and-announce.

MR. BAUGHMAN: If there is no warrant, there is no judicial command to enter, so the entry is completely unjustified. Here, we have not set the appropriate --

JUSTICE STEVENS: Well, but you might have probable cause, but just not have the -- have the warrant. So, what is the difference between having probable cause to enter, but failing to get a warrant, and having a warrant, but failing to knock and announce?

MR. BAUGHMAN: Because the fourth-amendment commands that the police not enter without judicial authorization. The police don't get to make the probable-cause decision in advance. And we wish to

have a judge make that decision, so we won't, in hindsight, say, "Had you gone to the judge, the judge would have found probable cause, so we'll ratify what you did after-the-fact." The entry itself -- not just the manner of entry -- the entry is invalid, unless the judge authorizes it, or unless some exception exists.

JUSTICE STEVENS: Is it your view the entry was lawful or unlawful, in this case?

MR. BAUGHMAN: The fact of entry was lawful.

JUSTICE STEVENS: No.

JUSTICE BREYER: So, in fact --

JUSTICE STEVENS: No --

JUSTICE BREYER: -- if they had a bazooka --

JUSTICE STEVENS: -- that's not the question. The actually -- actual entry was lawful, yes?

MR. BAUGHMAN: The entry was lawful.

JUSTICE STEVENS: Oh, okay.

JUSTICE BREYER: And the same would be true if what they had was a bazooka, and blew the house up.

[Laughter.]

MR. BAUGHMAN: Yes.

JUSTICE BREYER: Yes, okay.

MR. BAUGHMAN: Yes. The entry would be lawful. The manner of entry would be unlawful. And the consequence of that entry would turn on what force was used. As, in this case, they opened the door and walked in. There was no -- there was no injury to person, there was no injury to property.

JUSTICE SOUTER: So, basically, your argument rests on the fact that we can draw a distinction between entry and manner of entry.

MR. BAUGHMAN: Yes. My principle that I am advocating is that any police error in the execution of a search, or in the accomplishment of a search, bears fruit only in relation to the purpose, or purposes, served by the principle violated. One --

CHIEF JUSTICE ROBERTS: It's a --

MR. BAUGHMAN: -- has to ask --

CHIEF JUSTICE ROBERTS: It's a -- it's a strong argument, on the other side, that if we adopt your position, the officers would have no incentive, other than their own judgment about their personal safety, whether to comply with the knock-and-announce rule.

MR. BAUGHMAN: That is if one assumes that

the civil remedy -- that the 1983 actions has no teeth and has no force, and I don't believe that's true at all.

JUSTICE GINSBURG: What is the experience in Michigan? The Michigan Supreme Court has had this rule for some time, that you don't exclude the evidence.

MR. BAUGHMAN: Uh-huh.

JUSTICE GINSBURG: How many successful 1983 actions have there been --

MR. BAUGHMAN: I am not -- I am not aware of any. On the other hand, like Mr. Moran, I -- other than anecdotal evidence, I have no statistical evidence that the police are violating the knock-and-announce principle since the decision in Stevens.

JUSTICE GINSBURG: But you have not even one case that you can cite where a 1983 remedy was resorted to and was successful.

MR. BAUGHMAN: In Michigan, I don't. There are cases cited in our brief where, in fact, there are actions -- such actions brought. There are several recent decisions in the Seventh Circuit, for example, where qualified immunity was denied on a knock-and-announce violation in the cases in the District Court for trial or settlement. And there

may be many cases that don't make the reports, what actions are brought and settled.

JUSTICE GINSBURG: But you're not aware of any case --

MR. BAUGHMAN: I am not aware of any case --

JUSTICE GINSBURG: -- where anyone has recovered --

MR. BAUGHMAN: And, again, I think Mr. Moran correctly points out, in -- many of these cases are resolved by finding that the Richards v. Wisconsin exceptions have been met. It is not, to me, remarkable that there are not a lot of civil actions. I believe there are not a lot of violations, because, while no-knock entries may occur, they are justified, under Richards v. Wisconsin, in most cases. This case is an aberration.

JUSTICE GINSBURG: On the no-knock warrant, do you agree that it's not possible to get one in Michigan?

MR. BAUGHMAN: Yes, there is no statute in Michigan where one can go to the judge in advance and say, "Here are the facts, known to me already, before I even get to the scene, that should justify a no-

knock." That doesn't exist in Michigan. Michigan follows Richards v. Wisconsin, and, in -- had case law, even in advance of that, which simply said, "Whether known in advance, or whether the facts occurred at the time of the execution of the warrant, if the Richards exceptions are met, you can go in without knocking and announcing." So, we do follow that rule. You just simply can't get advance judicial authorization. It doesn't exist. But it is certainly permissible, and it -- as Mr. Moran indicated, it happens on a fairly regular basis, because, unlike Mr. Moran, I believe the notion that -- even in this case, I'm not saying there was no violation; there was a violation, because the police didn't know in advance that the defendant was sitting in a chair with the cocaine in his pocket, on the chair in front of him, and a gun by his side. I think that he would have answered the door. It's highly speculative, and somewhat fanciful, in that circumstance.

CHIEF JUSTICE ROBERTS: Do they get to make -- do they get to make "inevitable" arguments on their side? I mean, let's say, as what happened here, or as seemingly happened, the fellow is found near the chair with the drugs. Can't they argue,

"Well, if you had knocked and you had waited 10 seconds, he would have gotten up from the chair and gone somewhere else"? And you wouldn't have been able to argue, at trial, "He was sitting in the chair with the drugs."

MR. BAUGHMAN: That's true, but the drugs were -- in this case, the drugs were in his pocket. So, it wouldn't have helped him.

CHIEF JUSTICE ROBERTS: There was something in the chair, right? I mean, the --

MR. BAUGHMAN: There was --

CHIEF JUSTICE ROBERTS: -- the gun, or what --

MR. BAUGHMAN: The gun was in the -- in the chair, but he was only convicted for the drugs in his pocket.

CHIEF JUSTICE ROBERTS: Hmm.

MR. BAUGHMAN: I don't think he -- he could say, "If you would have -- I would have gotten up and answered the door; and, therefore, you wouldn't have had to come in without knocking, you wouldn't have had to break the door, you wouldn't have had to scare me."

CHIEF JUSTICE ROBERTS: You wouldn't have been able to tell the jury, "I was standing next to

the chair, because if I had -- I obviously would have gotten away from the chair, because I knew that's where the gun was."

MR. BAUGHMAN: That's -- that may well be. And I want to be clear, I am not here arguing that this Court should decide that there is no circumstance possible where something that occurs in the premises is not causally connected to the failure to knock and announce. All I'm asking the Court to decide is that causation is required before the exclusionary rule is implemented, and physical evidence found within a proper search of -- search of proper scope, pursuant to the warrant, that that is not causally connected to the -- to the knock-and-announce violation. There may be other --

JUSTICE SCALIA: So, you -- so, you think it's possible that the defendant could argue that the evidence should be excluded because, "Had he knocked and announced, I would have run to the toilet and flushed it down, rather than" --

MR. BAUGHMAN: No.

JUSTICE SCALIA: -- "answering the" --

MR. BAUGHMAN: No, I --

JUSTICE SCALIA: Well, why not?

MR. BAUGHMAN: I think the only thing he

could --

JUSTICE SCALIA: That's causal.

MR. BAUGHMAN: But I think you have to tie the causal connection to the purposes -- as I have tried to indicated -- to the purpose, or purposes, served by the principle violated. What is the purpose of knocking and announcing? And I think -- Your Honor indicated -- it's to protect against injury to the police, injury of people inside, and property. It has no purpose to protect against the invasion of the privacy of the dwelling and the discovery of the evidence. In fact, if the police knew in advance that the defendant might flush the drugs down the toilet, they wouldn't have to knock and announce at all. So, I think we have to relate the causal question to, What is the principle violated? What purposes does it serve? And, in the case of knock-and-announce, it does not serve the purpose of allowing evidence to be destroyed. That, in fact, serves as an exception to knocking and announcing at all.

JUSTICE SOUTER: What do you say the purpose of knock-and-announce is?

MR. BAUGHMAN: This Court has identified it on several occasions as to avoid unnecessary violence

to the property, avoid unnecessary possible injury to people, both to the officers who are executing the warrant and people inside, and to allow the person inside to prepare to answer -- as Mr. Moran indicated, if they might be in a state of undress or something, they could avoid that embarrassment.

JUSTICE SOUTER: So, I take it your argument is that, except in cases in which the people inside the house are not dressed, or cases in which there is, in fact, a gun battle of some sort, that a knock-and-announce violation will, in fact, never be the cause of any damage at all.

MR. BAUGHMAN: It will never be the cause of the discovery of the physical evidence found --

JUSTICE SOUTER: No, no, it -- no, but it'll never be the cause of any compensable damage at all.

MR. BAUGHMAN: Well, if a --

JUSTICE SOUTER: Because I take it your argument is: what you can recover from requires causation. And what I mean by "causation" is the causation of the harms which the rule is intended to avoid.

MR. BAUGHMAN: Correct.

JUSTICE SOUTER: And if the only harms that

the rule is intended to avoid is the exposure of nakedness and violence, once inside, and there are cases without nakedness or without violence, then, in those cases, there will never be a recovery.

MR. BAUGHMAN: Oh, in those cases, correct. In cases where there is violence, there will be recovery. In a case such as the instant one, where there is no nakedness, there is no violence, they simply opened an unlocked door, I would say, yes, there would be no recovery, in that circumstance; there would be no damages. There may be cases -- and this is why not -- I'm not arguing there was no knock-and-announce violation, in that the police shouldn't knock and announce, because, in different cases, the consequences may be dramatic, they may be severe, and damages may be severely assessed.

JUSTICE SOUTER: But, basically, your rule is, the police are entitled to take the chance. If they -- if they get inside, and people have got their clothes on and there's no gun battle, no problem; nothing that the police are exposed to, either by an exclusionary rule or by a civil recovery. And if they want to take that chance, if they want to take the chance that somebody will not be dressed or a gun will be pulled, basically that's their option.

MR. BAUGHMAN: I think, as in other situations where this Court does not apply the exclusionary rule, simply on a deterrence basis -- because the Court does not always apply the exclusionary rule, even when there would be deterrence -- that that is correct.

CHIEF JUSTICE ROBERTS: Well, that's not true. I mean, there are going to be situations, or at least possible, where evidence is going to be a -- causally connected to a violation of the knock-and-announce rule, right? The situation -- the warrant is because these people were involved in a shootout with the -- you know, the Johnson gang; they knock the door down and somebody yells, "Look out, it's the Johnson gang."

MR. BAUGHMAN: Yes.

CHIEF JUSTICE ROBERTS: And if they had knocked and announced, and "It's the police," they wouldn't have that statement that's incriminating. Now, you would agree that that statement would be excluded because of the violation, right?

MR. BAUGHMAN: Yes, exactly. That was precisely the point I was going to make, in terms of a hypothetical. We're not arguing -- as I tried to indicate earlier, we're not arguing that you need to

resolve every question today about what is, or is not, causally related. And there are circumstances where a spontaneous declaration -- you know, the police break through the door, and the defendant says, "The drugs are in the closet," and you want to use that declaration to tie him to the drugs -- that may well be causally connected. All we're asking today is for this Court to decide that the items -- the physical evidence found within a proper scope, a search of proper scope of the warrant that's being executed -- is not causally connected. Other questions of spontaneous declarations, tying the defendant by position to the chair, those may present different issues. But the drugs that were named in the search warrant as items to be searched for and seized are not causally connected; they are the fruit of the execution of the judicial command, not of the knock-and-announce violation.

JUSTICE STEVENS: I can understand the requirement there be causal connection. Are there cases in which courts have held that there was a knock-and-announce violation, and there is a general remedy of exclusion, unless -- except when there's a causal connection; but, in fact, the evidence was admitted because it was not causally connected to the

entry?

MR. BAUGHMAN: I'm not away of any.

JUSTICE STEVENS: I mean, I can understand the hypothetical, but it seems to me it's really a hypothetical.

MR. BAUGHMAN: Yeah. And I think the reason that that exists is because, up til today -- and Mr. Moran's correct, most courts go the other way -- up until the Stevens case, the assumption had been -- and I think the assumption has come from Miller and Sabbath -- the assumption has been, if there's a knock-and-announce violation, you exclude the evidence. So, questions of causation have not been explored until the Stevens case, and then the Seventh Circuit, in several opinions, has also reached the same conclusion. But I think Sabbath and Miller present very different circumstances. Sabbath and Miller, as the Court will recall, were arrest cases. And the arrest situation does not translate into the execution of a search warrant, because knock-and-announce serves a different purpose, an additional purpose, in the arrest situation, that is not served when -- in the search situation.

JUSTICE BREYER: Oh, I see your argument now. I think your argument is, most of the fourth-

amendment rules are really designed to prevent warrantless entries. But this one isn't.

MR. BAUGHMAN: That's correct.

JUSTICE BREYER: This one is designed to prevent damage to property --

MR. BAUGHMAN: That's correct.

JUSTICE BREYER: -- et cetera. So, let's not have the exclusionary rule and rely on the damage remedy where that kind of thing actually occurs, which isn't often.

MR. BAUGHMAN: That's correct.

JUSTICE BREYER: And if we buy that principle, suppose we were to apply it in the Miranda area -- purpose of a Miranda warning is really to make certain he can have a lawyer, if he wants one, for example. So, now we prove this guy wouldn't have asked for a lawyer anyway. All the evidence comes in.

I mean, it's an interesting principle. I see the logic. But it seems to me to have a lot of implications that this Court has never bought.

MR. BAUGHMAN: I think it's much more speculative in the -- in the fifth-amendment area, but I think --

JUSTICE BREYER: I can't think of any other

area, fifth or fourth, where we've bought it. And I've tried to explain, in the question, why we haven't bought it. Now, you go ahead.

MR. BAUGHMAN: But I think to not accept causation as a requirement, which I think this Court has always done -- as I said at the outset, this Court has said that implementation of the exclusionary rule is premised on the evidence being the product of the police misconduct. To not do that, to not have a causation requirement, I believe, severs this Court's current exclusionary-rule doctrines from its moorings. There are many circumstances that this Court has, at this point, at least, seen fit to rest with the lower courts, such as the execution of a search warrant. You search within proper scope, you're looking for computer monitors, you find them, but, as you're executing, you open a desk drawer and you shut it, you exceed the scope of the warrant. The law is pretty uniform, currently, that you don't suppress the computer monitors because you exceeded the scope by opening the drawer. If you found drugs in the drawer, you make -- you'd exclude those. But you don't exclude the monitors, because there's not a causal connection between the wrong in exceeding the scope of the

warrant and the discovery of the monitors.

All those cases are up for grabs again if this Court severs the causation requirement from the application of the exclusionary rule. And that's just one example; there are others. This Court has always required that there be a causal connection, and I believe that it should simply continue to do so.

We're not asking this Court to overrule any cases, to create any really new principles, we're simply asking this Court to understand that Sabbath and Miller were knock-and-announce for arrests. With an arrest situation, if a person surrenders at the door, you don't go in and search the premises thoroughly. There's a different purpose served in arrest. With a search warrant, knock-and-announce has no purpose of protecting the privacy of the dwelling itself with the discovery of the items named in the warrant, and they shouldn't be suppressed. Things that are causally connected can be left to an argument that may be made by counsel in different situations, but, as to the items named in the warrant -- contraband, fruit, spirits, instrumentalities -- that should not be suppressed. It is simply not causally connected to the entry, and we would ask

this Court to so hold.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Salmons.

ORAL ARGUMENT OF DAVID B. SALMONS

FOR THE UNITED STATES, AS AMICUS CURIAE,

IN SUPPORT OF RESPONDENT

MR. SALMONS: Thank you, Mr. Chief Justice, and may it please the Court:

The knock-and-announce rule, unlike the warrant and probable-cause requirements, not protect the individual's privacy interest in the items to be searched, and does not relate to the officer's authority to conduct the search and obtain the evidence. An unannounced or premature entry, therefore, does not detract from the officer's legal authority reflected in the warrant to enter and conduct a search. Instead, as this Court held in Segura, an untainted warrant provides an independent source for the search, even where the entry is illegal. There was only one entry in the Segura case, since the officers remained in the apartment until a warrant was finally obtained.

JUSTICE BREYER: It depends, of course, on whether you -- what you're doing. Now I see what

you're doing. You're applying a kind of Palsgraf causation analysis within the risk -- I think that's what you're doing -- to saying it's outside, it's not a cause. You're saying -- you don't say it's not a necessary condition of his being there. It is. You do say, "Well, the being-in-the-room-there is not within the risk, the reason for which we have a knock-and-announce rule." But, of course, that's a matter of judgment. I mean, you could say the purpose of the cause -- of the knock-and-announce rule is to keep people out of there without knocking and announcing. And if that's the purpose of it, it's right within the risk, right cause.

MR. SALMONS: Your Honor --

JUSTICE BREYER: You just are looking at the harms that his being there in that room without announcing might bring about. That doesn't mean that's why we don't have the rule. We have the rule to keep him out of there without announcing.

MR. SALMONS: Your Honor, there are -- there are several reasons why the Court has -- the Court has articulated several reasons for why there is the knock-and-announce rule. We think the important point, though, with regard to the Segura case is that the entry, in Segura, was unlawful both

because the officers did not announce and because they did not have a warrant. They, nonetheless, stayed there for 20 hours, and, when they finally did obtain a warrant, they conducted the search. And this Court had no difficulty in saying that, even though the initial entry was unlawful, the warrant-authorized search -- the warrant was an independent source for the search, and that the legality with regard to the initial entry was, quote, "wholly irrelevant to the evidence that was obtained pursuant to the warrant." And we would submit that it would be an odd fourth-amendment rule that would allow admission of the evidence where the officers failed to obtain a warrant. They entered without a warrant and without announcement, and only later obtained one, as in Segura; and then suppress all evidence, in this case, where the officers did obtain a warrant in advance, and their only illegality was the much more minor one of entering a few moments prematurely.

JUSTICE SOUTER: What was the --

MR. SALMONS: Nothing in this Court's cases --

JUSTICE SOUTER: I'm sorry, I didn't mean to interrupt.

MR. SALMONS: No, that's fine, Your Honor.

JUSTICE SOUTER: I was going to say, What was -- what were the grounds upon which the warrant, in Segura, was obtained?

MR. SALMONS: The warrant, in Segura, was obtained by -- based on evidence that was in existence prior to the unlawful entry, so that it was an untainted warrant.

JUSTICE SOUTER: So, it didn't -- it didn't depend on the entry or anything gained as a result of the entry, right?

MR. SALMONS: Well, of course, the officers -- once that warrant was obtained, officers would have to enter the apartment in order to conduct a search --

JUSTICE SOUTER: Right, but the --

MR. SALMONS: -- here, except for the fact that --

JUSTICE SOUTER: -- but the --

MR. SALMONS: -- they had already entered illegally and were already present illegally --

JUSTICE SOUTER: Right, but the warrant --

MR. SALMONS: -- in the apartment.

JUSTICE SOUTER: -- the warrant -- the warrant itself didn't depend on anything they had gained as a result of the entry. There was no --

MR. SALMONS: That's correct --

JUSTICE SOUTER: -- kind of causal --

MR. SALMONS: -- in Segura.

JUSTICE SOUTER: -- continuum there.

MR. SALMONS: That's absolutely correct, and that's --

JUSTICE BREYER: So, you do --

JUSTICE SOUTER: Isn't --

MR. SALMONS: -- a requirement for --

JUSTICE SOUTER: Isn't that the difference, though, with this case? Because, here, there is a causal continuum, at least, as Justice Breyer said, a but-for causal continuum. They wouldn't have been in the apartment but for the entry. And so, the authority of the warrant and the manner of executing the warrant are not divisible the way they were in Segura.

MR. SALMONS: Your Honor, with respect, I think that's -- it would be an improper reading of Segura. There was an illegal entry, in Segura, that was just as necessary in order to conduct the search and obtain evidence in that case as there was at premature entry here.

JUSTICE SOUTER: But, in Segura, the court issuing the subsequent warrant says, "You can -- you

can go in there and do this." The court -- by the way, I -- maybe this makes it even easier -- did the court, in Secuga, know that they were in the apartment?

MR. SALMONS: No, Your Honor.

JUSTICE SOUTER: Okay.

MR. SALMONS: Their -- they had no knowledge of the illegality, and the evidence that was -- that was the basis for the affidavit for the warrant was untainted by the illegal entry. But, of course, the same is true here, there was -- there is no allegation at all that --

JUSTICE BREYER: No, no --

MR. SALMONS: -- the warrant in this case --

JUSTICE BREYER: -- the difference is --

MR. SALMONS: -- is tainted.

JUSTICE BREYER: All right, look, this -- you know, I'd appreciate your explaining this -- this seems to me what you're saying in your brief was the inevitable discovery. The inevitable-discovery rule, in my -- the way -- the way I've thought of it, and I'd like you to correct me if I haven't thought of it correctly -- to use a kind of analogy, it's like a primitive tribe that beats a tomtom every morning so

the sun comes up. Hey, the sun's going to come up anyway, and the bodies are going to be discovered anyway, in those cases. And, in Segura, the warrant is going to be issued anyway. So, it isn't a question of whether it would have been issued if they had behaved properly, it's a question of what will really happen in the absence of the illegality.

MR. SALMONS: Well --

JUSTICE BREYER: Now, that's what I thought inevitable discovery here was, and, in the absence of these people entering the apartment illegally, they wouldn't have found a thing, because --

MR. SALMONS: Well, Your Honor --

JUSTICE BREYER: -- there was nothing else in motion.

MR. SALMONS: Your Honor, with respect, that is -- that is directly at odds with the way the Court, in Segura, approached --

JUSTICE BREYER: Now, which --

MR. SALMONS: -- the question.

JUSTICE BREYER: -- case is contrary to what I said?

MR. SALMONS: I think Segura is contrary to that.

JUSTICE BREYER: Segura?

MR. SALMONS: I think Murray --

JUSTICE BREYER: You have just said --

MR. SALMONS: -- is contrary to that.

JUSTICE BREYER: -- that, in Segura, they would have gotten in, anyway, under a legal warrant that had nothing whatsoever to do with the illegal entry.

MR. SALMONS: In fact, that is precisely the analysis --

JUSTICE BREYER: The sun rose, anyway.

MR. SALMONS: -- that's precisely the analysis the Court ordered -- took in Segura. It said, if there had been no illegal entry, the officers --

JUSTICE BREYER: Right.

MR. SALMONS: -- would have obtained the evidence --

JUSTICE BREYER: Exact --

MR. SALMONS: -- the same way --

JUSTICE BREYER: No. Well --

MR. SALMONS: -- because they had --

JUSTICE BREYER: -- not "would have." Did.

MR. SALMONS: Well, Your -- I'm just informing Your Honor what the Segura case says. It says the court -- the courts would have found --

excuse me -- the officers would have found the same evidence that they found pursuant to the warrant if they had complied with the fourth amendment. That's because the court viewed the -- that warrant as a separate independent source for the authority to enter and conduct a search. One would have to posit, I guess, that the officers in this case, if they -- if they would rather not execute the warrant than delay a few additional moments before entering, but I think that would not be a very realistic hypothesis.

JUSTICE GINSBURG: Then your --

MR. SALMONS: Now, with regard --

JUSTICE GINSBURG: -- position is that you never -- if you have a warrant, then you can seize what the warrant lists. So, if you have a warrant, then there is never a reason that the police would have to knock and announce, because the warrant gives them independent authority to enter. That seems to be what you're saying, that as long as you have a warrant, there -- the knock-and-announce does not have to be complied with.

MR. SALMONS: No, Your Honor. The knock-and-announce requirement is -- we take no issue with that. That is required by the fourth amendment. With regard --

JUSTICE O'CONNOR: Well --

MR. SALMONS: -- to deterrence --

JUSTICE O'CONNOR: -- but in this very case you had an officer who said it was his regular policy --

MR. SALMONS: Well --

JUSTICE O'CONNOR: -- never to knock and announce --

MR. SALMONS: That's not --

JUSTICE O'CONNOR: -- to just go in. So, if the rule you propose is adopted, then every police officer in America can follow the same policy. Is there no policy protecting the homeowner a little bit --

MR. SALMONS: Of course the --

JUSTICE O'CONNOR: -- and the sanctity of the home --

MR. SALMONS: Of course there is --

JUSTICE O'CONNOR: -- from this immediate --

MR. SALMONS: -- Your Honor, and that is not --

JUSTICE O'CONNOR: -- entry?

MR. SALMONS: -- our position. And we, respectfully, would argue that that's not an

appropriate way to conduct the deterrence analysis. Even just on the terms of deterrence, we think that suppression here would be a disproportionate remedy. And that's because, as this Court has repeatedly recognized, the officers already have an incentive, inherent in the nature of the circumstances, to announce and delay some period of time before entry. Now, there may be --

JUSTICE SOUTER: But what --

MR. SALMONS: -- not --

JUSTICE SOUTER: Wait a minute. What is this incentive inherent in the circumstances?

MR. SALMONS: It's not to be mistaken for an intruder and shot at, Your Honor.

JUSTICE SOUTER: Well, it doesn't seem to work.

MR. SALMONS: Well --

JUSTICE SOUTER: I mean, you've got -- this is a case in which the officer testifies, "It never works, I always go in."

MR. SALMONS: That's not really -- I mean, to be fair, Your Honor, that's not what he testified to, exactly. What he said was, he's been shot at several times, and he went in early, in this case, in part because of his safety concerns. But he didn't

speak to any broader policy.

JUSTICE SOUTER: When is it going --

MR. SALMONS: But, in any event, the --

JUSTICE SOUTER: I mean, what reason do we have to believe that this incentive inherent in circumstances is ever going to work in the absence of an exclusionary rule?

MR. SALMONS: Well, Your Honor, I think -- I think there are several reasons. One -- and, again, this Court -- these are -- all of the things I'm going to list come from this Court's cases, including Nix and Murray and Segura, where the Court has applied the doctrines we ask the Court to apply here. And what you have is, you have the inherent incentive to knock and announce, because of their own safety concerns. We think the only thing that might not cover, in terms of deterrence, would be the additional few moments you may want them to wait. They will announce, and they will delay some period of time.

Now, in the absence of concerns about safety or destruction of evidence, the officers have nothing to gain by entering prematurely. And so, in doing a deterrence analysis, I think it's important to keep that in mind. It's not like there's a huge

gain for the officers --

JUSTICE SOUTER: Why don't they --

MR. SALMONS: -- when they don't have legitimate concerns.

JUSTICE SOUTER: Why don't they have something to gain? If they're right that there is evidence inside, they gain. They're -- I mean, they're perfectly rational --

MR. SALMONS: Well --

JUSTICE SOUTER: -- in this. They gain a greater chance of getting that evidence than if they let a few seconds elapse and the evidence can be flushed away.

MR. SALMONS: To be sure, Your Honor, there are times when they may miscalculate the nature of the concerns about safety and destruction of evidence, but, in cases where there aren't those concerns, they have nothing to gain. And, in addition, entering prematurely may make them a defendant in 1983 or Bivens actions, which I'm sure that no officer --

JUSTICE SOUTER: For --

MR. SALMONS: -- relishes and --

JUSTICE SOUTER: For which there is no record of any recovery in any court in the United

States, isn't that correct?

MR. SALMONS: May I answer, Your Honor?

CHIEF JUSTICE ROBERTS: Sure.

MR. SALMONS: Your Honor, I would -- I would disagree with that. And I would point the Court, in particular, to a recent case out of the Seventh Circuit, Jones versus Wilhelm. The Seventh Circuit has announced the position -- it decided the position that we advocate. There are many cases, Your Honor -- the courts -- the courts are replete with them -- where people --

CHIEF JUSTICE ROBERTS: Thank --

MR. SALMONS: -- bring those types of claims, and win, and then they settle.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

MR. SALMONS: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Moran, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF PETITIONER

MR. MORAN: Thank you, Mr. Chief Justice.

First of all, as to the evidence that is causally connected to the knock-and-announce violation, there are two reasons why the remote possibility of such evidence will never deter police

officers from violating the knock-and-announce requirement. The first is that it's very remote. I'm not aware of a single case in American history where there has been identified such evidence that is directly causally related only to the knock-and-announce violation. But the second reason, more fundamental, is that even if there were such evidence, by definition the possibility of finding such evidence will not deter the police from committing a knock-and-announce violation, because they wouldn't have found that evidence had they complied with the knock-and-announce requirement. In other words, the police would only gain that evidence by committing the knock-and-announce violation, so there would be nothing lost in going ahead and risking an excited utterance that they wouldn't be able to use, because, by definition, they wouldn't be getting that excited utterance, anyway.

I think it's important, with the solicitor general's brief, to rebut the claim that Miller and Sabbath had something to do with the fact that there was no warrant in those cases. Nothing in Miller and Sabbath turned on the absence of a warrant. And, in fact, in Miller the Court specifically said, "The requirements stated in Semayne's case still obtains.

It applies, as the Government here concedes, whether the arrest is to be made by virtue of a warrant or when officers are authorized to make an arrest for a felony without a warrant." The Government conceded, in Miller, that whether there was a warrant or not had nothing to do with the knock-and-announce violation in that case.

JUSTICE SCALIA: I thought the Government's distinction was based on the fact that they were arrest cases. I thought that's the distinction they were making.

MR. MORAN: Perhaps I misread their brief, Justice Scalia, but I thought it was that there was an absence of a warrant. Of course, this is an arrest case, as well. The -- Mr. Hudson was seized, and was searched, incident to arrest. And so, this was also an arrest case, much like Miller and Sabbath.

As for the causal-connection argument, if this Court were to accept it, I listed, in my principal brief, a litany of cases that I think would have to be overruled -- Katz, Knowles, Silverthorne Lumber -- for that matter, Kyllo. All those cases say that it doesn't matter that the Government has a clear, lawful route to get the evidence; the fact

that they didn't follow that clear, lawful route prevents the Government from using that evidence. And it's impossible to explain how Mr. Baughman's causation theory is consonant with all of those cases.

CHIEF JUSTICE ROBERTS: Well --

MR. MORAN: I think --

CHIEF JUSTICE ROBERTS: Well, isn't the -- isn't the reason it's consonant is because, in those cases, there is a -- the connection, in terms of the purposes of the rule that was violated and the evidence that was seized?

MR. MORAN: Mr. Chief Justice, I think the same applies here. I think that the knock-and-announce rule is about the sanctity of the home. And this Court could not have said it any more clearly in Wilson, that the reasonableness of a search or seizure inside a home is connected to the method of entry. In fact, the Court said it three times, in Wilson, in various ways. And so, I think it is the purpose of the knock-and-announce rule, is to protect the homeowner's right of privacy against shock, fright, and embarrassment that can come with a precipitous police entry.

CHIEF JUSTICE ROBERTS: But not the general

privacy of the home, because you don't dispute that if he had waited an additional 4 seconds, he could have entered the home and executed the warrant.

MR. MORAN: No, we don't dispute that at all, Mr. Chief Justice.

Finally, I have to ask why this Court has decided all these knock-and-announce cases in the last 10 years, if my opponents are right. This Court shouldn't have -- they're all criminal cases, and this Court should have simply said the Petitioners or Respondents, as the case may be, cannot obtain the relief they are seeking, because the knock-and-announce rule is not causally related to the evidence that they're trying to suppress. And so, if this Court were to adopt my opponent's position, the knock-and-announce rule will become a dead letter. There will be virtually no cases, there will be virtually no more development of this rule. This Court would have been wrong in Miller, it would have been wrong in Sabbath, and it was wrong to reach the substantive constitutional questions it reached in Banks, Richards, Ramirez, and Wilson. And all the other courts, the -- virtually every State currently suppressing evidence seized after a knock-and-announce -- well, they would have to be wrong, too.

And so, a lot of courts, including this Court, have been wrong a lot of times, if my opponent is correct.

Finally, one last word on Segura. Segura is the sort of case where one can make a respectable inevitable-discovery -- in fact, a winning inevitable-discovery or independent-source argument. But the key thing in Segura is, this Court did not disturb the fact that the evidence that was seized during the initial entry was suppressed, because that was directly connected to the unlawful entry. And so, the evidence that the police initially seized, before the 19-hour wait in Segura, was suppressed.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

[Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.]